Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re	)	
DETERMINATION OF ROYALTY RATES AND TERMS FOR TRANSMISSION OF SOUND RECORDINGS BY SATELLITE RADIO AND "PREEXISTING" SUBSCRIPTION SERVICES (SDARS III)	)	**Docket No. 16-CRB-0001-SR/PSSR (2018-2022)**

SIRIUS XM RADIO INC.'S REPLY TO GEORGE JOHNSON'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Sirius XM Radio Inc. ("Sirius XM"), a preexisting satellite digital audio radio service ("SDARS") as defined in 17 U.S.C. § 114(j)(10), respectfully submits its Reply to George Johnson's Proposed Findings of Fact and Conclusions of Law (the "Reply").

In many instances, the proposed findings do not address the facts of this proceeding or reference the correct regulations or the applicable legal precedent, making meaningful response particularly challenging. Sirius XM notes that multiple paragraphs in George Johnson's Proposed Findings of Fact and Conclusions of Law appear to be copied verbatim from the Copyright Owners' Proposed Findings of Fact and Proposed Conclusions of Law in Docket No. 16–CRB–0003–PR (2018–2022) (*Phonorecords III*), and thus, not applicable to this proceeding. Sirius XM also notes that the proposed findings make multiple references to a proposed Subpart C for § 382, but it has not been able to locate the text of the proposed Subpart C in GEO's filings to date and accordingly, is not in a position to respond to that proposal.

What follows is Sirius XM's response to as much of GEO's Proposed Findings of Fact and Conclusions of Law as pertain to Sirius XM and to this proceeding.[1]

[1] Consequently, Sirius XM's responses only address as much of GEO's Proposed Findings of Fact and Conclusions of Law as pertain to Sirius XM and to this proceeding, and are not intended to respond in any way to the claims made by any of the participants in the *Phonorecords III* proceeding.

SIRIUS XM'S REPLY TO GEORGE JOHNSON'S PROPOSED CONCLUSIONS OF LAW

1. The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered. *Mazer v. Stein*, 437 U.S. 201, 219 (1954) (internal citations omitted) (holding that the original expression embodied within a statue intended to be used as a base for table lamps was entitled to copyright protection).

Response to 1: Disputed. Sirius XM does not dispute that the cited case contains the language described above. However, Sirius XM disputes the relevance and specific application of any cited proposition to the matters at issue in this proceeding.

2. "This limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired. The monopoly created by copyright thus rewards the individual author in order to benefit the public." *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 546 (1985) (internal citations omitted) (finding that the use of an unpublished manuscript in a political commentary magazine was not fair use).

"We agree with the Court of Appeals that copyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors." *Id.* at 545-46.

"In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Id.* at 558.

Response to 2: Disputed. Sirius XM does not dispute that the cited case contains the language described above. However, Sirius XM disputes the relevance and specific application of any cited proposition to the matters at issue in this proceeding.

2. "The 'constitutional command,' we have recognized is that Congress, to the extent it enacts copyright laws at all, create a 'system' that 'promote[s] the Progress of Science.' We have also stressed . . . that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (internal citations omitted) (rejecting Petitioner's constitutional argument that the CTEA's extension of existing

copyrights does not "promote the Progress of Science" as contemplated by the preambular language of the Copyright Clause).

JUSTICE STEVENS' characterization of reward to the author as "a secondary consideration" of copyright law, *post*, at 227, n. 4 (internal quotation marks omitted), understates the relationship between such rewards and the "Progress of Science." As we have explained, "[t]he economic philosophy behind the [Copyright] [C]lause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Accordingly, "copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge. . . . The profit motive is the engine that ensures the progress of science." *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (SDNY 1992), aff'd, 60 F.3d 913 (CA2 1994). Rewarding authors for their creative labor and "promot[ing] . . . Progress" are thus complementary; as James Madison observed, in copyright "[t]he public good fully coincides . . . with the claims of individuals." The Federalist No. 43, p. 272 (C. Rossiter ed. 1961). JUSTICE BREYER's assertion that "copyright statutes must serve public, not private, ends," *post*, at 247, similarly misses the mark. The two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones. *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (U.S. 2003)

Response to 2: **Disputed.** Sirius XM does not dispute that the cited cases contain the language described above. However, Sirius XM disputes the relevance and specific application of any cited proposition to the matters at issue in this proceeding.

3. "Nothing in the text of the Copyright Clause confines the 'progress of Science' exclusively to 'incentives for creation.' Evidence from the founding, moreover, suggests that inducing *dissemination*—as opposed to creation—was viewed as an appropriate means to promote science." *Golan v. Holder*, 132 S. Ct. 873, 888 (2012) (citations omitted).

Response to 3: **Disputed.** Sirius XM does not dispute that the cited case contains the language described above. However, Sirius XM disputes the relevance and specific application of any cited proposition to the matters at issue in this proceeding.

4. "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." 'The sole interest of the United States and the primary object in conferring the monopoly" the his Court has said, "lie in the general benefits derived by the pubic from the labors of authors" *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

Response to 4: **Disputed.** Sirius XM does not dispute that the cited case contains the language described above. However, Sirius XM disputes the relevance and specific application of any cited proposition to the matters at issue in this proceeding.

5. "[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded." *Id.* at 156 n. 6 (quoting *Cary v. Longman*, 1 East *358, 362 n. (b), 102 Eng. Rep. 138, 140 n. (b) (1801). (quoting Lord Mansfield)

Response to 5: **Disputed.** Sirius XM does not dispute that the cited case contains the language described above. However, Sirius XM disputes the relevance and specific application of any cited proposition to the matters at issue in this proceeding.

6. "Since Congress has elected to grant certain exclusive rights to the owner of a copyright in a protected work, it is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies, and resources which are invested in the protected work." *Klitzner Indus. v. HK James & Co.*, 535 F. Supp. 1249, 1259-60 (E.D. Pa. 1982). Cited in *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1254-55 (3d Cir. 1983); *Concrete Machinery Co., Inc. v. Classic Law Ornaments, Inc.*, 843 F.2d 600, 612 (1st Cir. 1988); *Taylor Corp. v. Four Seasons Greetings*, LLC, 403 F.3 958, 968 (8th Cir. 2005).

Response to 6: **Disputed.** Sirius XM does not dispute that the cited cases contain the language described above. However, Sirius XM disputes the relevance and specific application of any cited proposition to the matters at issue in this proceeding.

7. "The object of copyright law is to promote the store of knowledge available to the public. But to the extent it accomplishes this end by providing individuals a financial incentive to contribute to the store of knowledge, the public's interest may well be already accounted for by the plaintiff's interest." *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

Response to 7: **Disputed.** Sirius XM does not dispute that the cited case contains the language described above. However, Sirius XM disputes the relevance and specific application of any cited proposition to the matters at issue in this proceeding.

8. "The stated objective was 'to promote the progress of science [*i.e.*, knowledge]'; the means by which this was to be accomplished was the granting to authors of exclusive rights with

respect to their writings. The theory espoused by this constitutional provision is that the advancement of public good, through growth of knowledge and learning, is to be obtained by securing the private commercial interests of authors. If authors are guaranteed the opportunity to profit from their writings, they will have an incentive to create, and the public will ultimately reap the resulting expansion of human knowledge. In contrast, if no copyright protection were granted and others were permitted to copy freely works of authorship, authors would find it difficult to earn a living from their writings; their energies would be diverted to other pursuits by the need to feed their families; consequently, the public's right to appropriate the works of authors would make the public poorer through loss of the benefit of authors' endeavors. This led James Madison to observe, 'the utility of [the power conferred by the patent and copyright clause] will scarcely be questioned.... The public good fully coincides in both cases with the claims of individuals.'" *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (SDNY 1992), aff'd, 60 F.3d 913 (CA2 1994).

Response to 8: **Disputed.** Sirius XM does not dispute that the cited case contains the language described above. However, Sirius XM disputes the relevance and specific application of any cited proposition to the matters at issue in this proceeding.

9. "If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough." — Justice Holmes *Herbert v. Shanley Co.*, Decision 242 U.S. 591 (1917)

Response to 9: **Disputed.** Sirius XM does not dispute that the cited case contains the language described above. However, Sirius XM disputes the relevance and specific application of any cited proposition to the matters at issue in this proceeding.

10. "When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." (some citations omitted)). *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, 52 S.Ct. 546, 547, 76 L.Ed. 1010.

Response to 10: **Disputed.** Sirius XM does not dispute that the cited case contains the language described above. However, Sirius XM disputes the relevance and specific application of any cited proposition to the matters at issue in this proceeding.

11. "The Judges [of the CRB] are required to determine royalty rates that 'most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.' 17 U.S.C. § 114(f)(2)(B).". See *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 387 U.S. App. D.C. 387, 295-96, 574 F.3d 748, 75657 (D.C. Cir. 2009)

Response to 11: **Disputed.** Sirius XM does not dispute that the cited case contains the language described above. Sirius XM disputes the relevance and specific application of any cited proposition to the matters at issue in this proceeding, particularly given that the cited case was applying the willing buyer, willing seller standard rather than the Section 801(b) standard that governs this proceeding. As such, it misstates the Judges' task.

12. "[A]gencies . . . have 'an obligation to address properly presented constitutional claims which . . . do not challenge agency actions mandated by Congress.'" *McBryde v. Comm. to Rev. Circuit Council Conduct*, 264 F.3d 52, 62 (D.C. Cir. 2001) (quoting *Graceba Total Comms., Inc. v. FCC*, 115 F.3d 1038, 1042 (D.C. Cir. 1997)); *see also Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987) ("Federal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it. . . . [The FCC] must discharge its constitutional obligations by explicitly considering [the petitioner's] claim that the FCC's enforcement of the fairness doctrine against [the petitioner] deprives it of its constitutional rights. The [FCC's] failure to do so seems to us the very paradigm of arbitrary and capricious administrative action."). This rule "guard[s] against premature or unnecessary constitutional adjudication," and ensures that courts have the "benefit . . . [of] the [agency's] analysis." *Meredith Corp.*, 809 F.2d at 872. Moreover, even when an argument is non-constitutional, an agency must respond to it so long as it "do[es] not appear frivolous on [its] face and could affect the [agency's] ultimate disposition." *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997).

Response to 12: **Disputed.** Sirius XM does not dispute that the cited cases contains the language described above. However, Sirius XM disputes the relevance and specific application of any cited proposition to the matters at issue in this proceeding.

13. *Care Net Pregnancy Ctr. of Windham County v. U.S. Dep't of Agric.*, 896 F. Supp. 2d 98, 116 (D.D.C. 2012); accord McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of U.S., 347 U.S. App. D.C. 302, 312, 264 F.3d 52, 62 (2001) ("[A]gencies do have 'an obligation to address properly presented constitutional claims which . . . do not challenge agency actions mandated by Congress.' Graceba Total Communications, Inc.

v. F.C.C., 115 F.3d 1038, 1042 (D.C. Cir. 1997). See also Meredith Corp. v. F.C.C., 809 F.2d 863, 872-74 (D.C. Cir. 1987). We can see neither any reason why Congress would have withdrawn that power and obligation from a reviewing 'agency' composed exclusively of Article III judges nor any indication that it has done so."); *Iowa v. FCC*, 342 U.S. App. D.C. 389, 392, 218 F.3d 756, 759 (2000) ("T]he Commission's failure to address Iowa's argument requires that we remand this matter for the Commission's further consideration. See, e.g., Frizelle v. Slater, 111 F.3d 172, 177 (D.C. Cir.1997) (remanding where agency 'did not respond to two . . . arguments, which do not appear frivolous on their face and could affect the [agency's] ultimate disposition'); *AT&T Corp. v. FCC*, 86 F.3d 242, 247 (D.C. Cir.1996) (remanding where Commission 'completely failed to address' argument raised in ex parte letter).")

Response to 13: **Disputed.** Sirius XM does not dispute that the cited cases contain the language described above. However, Sirius XM disputes the relevance and specific application of the cited proposition to the matters at issue in this proceeding.

14. "As a preliminary matter, United Space is right to object to the administrative law judge's assertion that the administrative hearing over which he presided was not the proper forum in which to raise an equal protection argument, and that such a claim would be better raised in federal district court. "Although government agencies may not entertain a constitutional challenge to authorizing statutes they must decide constitutional challenges to their own policies whether embodied in generic rules or as applied in an individual case." *Lepre v. Dep't of Labor*, 275 F.3d 59, 75 (D.C. Cir. 2001) (citing *Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir.1987)). "The administrative law judge was plainly wrong to suggest otherwise." *United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 97 n.10 (D.D.C. 2011)

Response to 14: **Disputed.** Sirius XM does not dispute that the cited cases contain the language described above. However, Sirius XM disputes the relevance and specific application of the cited proposition to the matters at issue in this proceeding.

15. *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597, 17 S.Ct. 198, 205-206, 41 L.Ed. 560 (1896) (A rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law"); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585, 62 S.Ct. 736, 742, 86 L.Ed. 1037 (1942) ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense"); *FPC v. Texaco Inc.*, 417 U.S. 380, 391-392, 94 S.Ct. 2315, 2392, 41 L.Ed.2d 141 (1974) ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level"). If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments. As has been observed, however, "[h]ow such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question." *Smyth v. Ames*, 169 U.S. 466, 546, 18 S.Ct. 418, 433-434, 42 L.Ed. 819 (1898). *See also Permian Basin Area Rate Cases*, 390 U.S. 747, 790, 88 S.Ct. 1344, 1372, 20

L.Ed.2d 312 (1968) ("[N]either law nor economics has yet devised generally accepted standards for the evaluation of rate-making orders"). *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 30708 (1989).

Response to 15: Disputed. Sirius XM does not dispute that the cited cases contain the language described above. However, Sirius XM disputes the relevance and specific application of the cited proposition to the matters at issue in this proceeding.

16. "By long standing usage in the field of rate regulation, the 'lowest reasonable rate" is one which is not confiscatory in the constitutional sense." *Ill. Bell Tel. Co. v. FCC*, 300 U.S. App. D.C. 296, 302, 988 F.2d 1254, 1260 (1993) quoting *Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942)

Response to 16: Disputed. Sirius XM does not dispute that the cited case contains the language described above. However, Sirius XM disputes the relevance and specific application of the cited proposition to the matters at issue in this proceeding.

17. "The favored mechanism is by direct dealings in a competitive market with the owners of those rights, typically record companies." — Mr. Bruce Rich counsel for Pandora

"The setting of rates through SoundExchange as an aggregator and the Copyright Royalty Board as a rate-making body is the alternative, second-best scenario described and authorized in Section 114 of the Copyright Act. Direct arm's-length transactions between interested parties in a free market is always preferable to the imperfect task of setting a regulatory rate."

"Defendants and their unnamed co-conspirators have, quite simply, attempted to eliminate entirely the first and preferred method of sound recording performance rights licensing under Section 114."

"Lest Defendants and their co-conspirators continue to succeed in stifling price competition across the entire market for licensing performance and other copyright rights in sound recordings, whether pursuant to statutory licenses or otherwise. Defendants' unlawful conduct should be permanently enjoined with such other and further relief as is necessary to dissipate the effects of that conduct and restore free competition." *SiriusXM Radio, Inc. v. SoundExchange, Inc. and American Association of Independent Music,* 12 CV 2259 (SDNY 2012)

Response to 17: Disputed in part. The statement above quotes a complaint filed by Sirius XM before the Southern District of New York in 2012 alleging an antitrust conspiracy by sound recording trade associations to prevent the direct licensing of sound recordings by Sirius XM. While Sirius XM does not dispute that efforts by a trade organization to prevent its

members from entering into direct licenses to force a music user to utilize the compulsory license would be improper, and further does not dispute that the quotations are accurate, the complaint itself is not relevant here, and Sirius XM disputes the relevance and specific application of such a pleading to GEO's Proposed Conclusions of Law.[2] Sirius XM further notes that only the first page of the complaint has been offered into evidence in this proceeding, subject to the parties' objections. *See* Trial Ex. 1182; 5/2/17 Tr. 2193:2-11.

18. Three Register of Copyrights have quoted on how copyright and the author are first, the public second.

Response to 18: Disputed. Sirius XM disputes the above characterization of the purported statements of the Registers of Copyright or that this proposition is an accurate characterization of U.S. copyright law. Sirius XM further disputes the relevance and specific application of the cited proposition to the matters at issue in this proceeding.

19. Mr. Ralph Oman…what is "...the true nature of copyright — as an exclusive private property right, or as a limited right to be doled out stingily, riddled with exceptions and limitations, to be given away free-of-charge"?

Response to 19: Disputed. This proposed conclusion is inadmissible hearsay, and Sirius XM has not been able to verify the accuracy or the context of the quotation.

20. Marybeth Peters "*At the time it was drafting the 1976 Copyright Act, Congress realized that the mechanical license was flawed because a statutorily-set, never- changing royalty rate was inflexible and did not provide fair compensation."* - testimony to the Judiciary Committee in 2002.

[2] Sirius XM notes that it has elsewhere addressed reluctance on the part of some record labels to enter into direct licenses. *See, e.g.*, SXM PFF ¶¶ 161, 171.

Response to 20: **Disputed.** This proposed conclusion is inadmissible hearsay, and Sirius XM disputes the relevance and specific application of the quoted language above to the matters at issue in this proceeding.

21. Former Register Marybeth Peter's quote from the 1995 CARP rate proceeding where she said the Services stopped "*prematurely*" and "*without once considering the value of the individual performance"*[3] Here is a quote from the A2IM Brief, which quotes Register Peters in the 1995 DPRSR. Register Peters clearly makes her point on the importance of establishing the value of an individual performance of a sound recording: A2IM writes: "Indeed, in the first proceeding under the Digital Performance Right in Sound Recordings Act of 1995, under the predecessor to the current version of Section 114(f) for then extant digital services, the Copyright Register made a specific finding on this point:

"2. **Value of an individual performance of a sound recording.** *The Register notes that the Panel stopped prematurely in its consideration of the value of the public performance of a sound recording.* Its entire inquiry focused on the value of the "blanket license" for the right to perform the sound recording, *without once considering the value of the individual performance-a value which must be established* in order for the collecting entity to perform its function not only to collect, but also to distribute royalties. Consequently, the Register has made a determination that each performance of each sound recording is of equal value and has included a term that incorporates this determination."

"To do otherwise requires the parties to establish criteria for establishing differential values for individual sound recordings or various categories of sound recordings. ***Neither the Services nor RIAA proposed any methodology for assigning different values to different sound recordings***. In the absence of an alternative method for assessing the value of the performance of the sound recording, the Register has no alternative but to find that the value of each performance of a sound recording has equal value. Furthermore, the structure of the statute contemplates direct payment of royalty fees to individual copyright owners when negotiated license agreements exist between one or more copyright owner and one or more digital audio service. To accommodate this structure in the absence of any statutory language or legislative intent to the contrary, ***each performance of each sound recording*** must be afforded equal value."[4]

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[3] Determination of Reasonable Rates and Terms For The Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, at 25412 (May 8, 1998) Final Rule and Order (overturning certain aspects of rates and terms set by the CARP, the predecessor to the CRJs) (emphasis added) Page 18 http://www.copyright.gov/history/mls/ML-597.pdf

[4] Determination of Reasonable Rates and Terms For The Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, at 25412 (May 8, 1998) Final Rule and Order (overturning certain aspects of rates and terms set by the CARP, the predecessor to the CRJs) (emphasis added) GEO underlined relevant sections for Your Honors "without once considering the value of the individual performance" and "Neither the services nor RIAA proposed any methodology for assigning different values to different sound recordings." and "there was a single

Response to 21: **Disputed.** Sirius XM disputes that the extensive portion of A2IM's brief quoted in the guise of a proposed conclusion of law has any bearing on this proceeding.

22. Maria Pallante - Quotes relating to devotion of craft from "The Next Great Copyright Act"

"Copyright is for the author first and the nation second."

"I think the problem we have today in terms of imbalance that we might feel in the copyright statute is that we have gotten away from that equation that puts the authors as the primary beneficiaries, followed by the public good."

"Unfortunately, I start with enforcement because, if you don't have exclusive rights in the first place, you can't get to other questions."

"The issues of authors are *intertwined* with the interests of the public. As the first beneficiaries of the copyright law, authors are not a counterweight to the public interest but are instead at the very center of the equation. In the words of the Supreme Court, "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. *But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." (emphasis added)*

"Congress has a duty to keep authors in its mind's eye, including songwriters, book authors, filmmakers, photographers and visual artists. Indeed, "[a] rich culture demands contributions from authors and *artists who devote thousands of hours to a work and a lifetime to their craft." A law that does not provide for authors would be illogical—hardly a copyright law at all. And it would not deserve the respect of the public." (emphasis added)*

Response to 22: **Disputed.** This uncited quotation to a speech from Ms. Pallante is inadmissible hearsay and appears to be an expression of her personal views, including suggestions for copyright reform, rather than a statement of applicable U.S. copyright law, and Sirius XM disputes the relevance and specific application of the quoted language above to the matters at issue in this proceeding.

23. Of course, pursuant to § 802(f)(1)(A) "the Copyright Royalty Judges shall have *full independence* in making determinations concerning *adjustments* and determinations of copyright royalty *rates and terms*, …"

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representative of all sound recording owners, in this case, the RIAA." Page 18 http://www.copyright.gov/history/mls/ML-597.pdf

Response to 23: **Not disputed.**

24. George D. Johnson, is an individual *pro se* singer/songwriter, music publisher and independent sound recording creator.

Response to 24: **Not disputed.**

25. GEO's proposed rates and terms were fully supported at the hearing by the testimony of fact and expert witnesses and documentary evidence of GEO and SoundExchange.

Response to 25: **Disputed.** There is no competent evidence to support GEO's proposed rates and terms.

26. Overall Music Revenues and sales of albums and singles by download have been "cannibalized" or "substituted for" by all interactive and non-interactive streaming performances the past 10 to 15 years.

Response to 26: **Disputed.** *See* Sirius XM Radio Inc.'s Proposed Findings of Fact and Conclusions of Law ("SXM PFF") §§ I.B-C, III.A.ii.

27. Cannibalization or streams that "substitute for" sales and the shadow of the compulsory license are the two biggest problems the music industry and copyright owners face from the Services

Response to 27: **Disputed.** *See* SXM PFF §§ I.B-C, III.A.ii.

28. Current Statutory Rates And Direct Deals Under The Compulsory Shadow Are Not Useful Benchmarks. The Statutory Rate Is a Ceiling For Agreements Made In Its Shadow.

Response to 28: **Disputed.** *See* SXM PFF §§ II.A, III.A, III.B.

29. GEO argues that if three individual representatives of the Digital Music Association ("DiMA"), the Recording Industry Association of America ("RIAA"), and the National Music Publishers Association ("NMPA") can create entirely new rates, new terms, new licensing categories, new code sections and two completely new Subparts in 37 C.F.R §385 out of thin air, so can GEO or any other rate participant. [Footnotes omitted]

Response to 29: **Disputed in part.** Sirius XM does not dispute that GEO, like any participant in this proceeding, may propose rates as part of his written direct statement to be considered by the Copyright Royalty Board. *See* 37 C.F.R. § 351.4(b)(3). However, pursuant to 17 U.S.C. § 801(b)(1), only the Copyright Royalty Board—not any individual participant in the

proceeding—has the authority to make determinations of reasonable rates and terms for the statutory license at issue in this proceeding, and only Congress has the authority to pass new laws. Sirius XM also notes that DiMA and NMPA are not participants in this proceeding and have not submitted proposed rates or terms in this proceeding.

30. Furthermore, if DiMA, RIAA, and NMPA can create new rates, terms, new licensing categories, new code sections and entirely new Subparts in 37 C.F.R §385 *for §114 sound recordings, while being in a §115 mechanical hearing* for Phonorecords I and II, so can GEO or any other rate participant. Somehow, the segmentation or fragmentation of music copyrights was not an obstacle to them, apparently since they were creating new code sections and Subparts from scratch.

Response to 30: **Disputed in part.** Sirius XM does not dispute that GEO, like any participant in this proceeding, may propose rates as part of his written direct statement to be considered by the Copyright Royalty Board. *See* 37 C.F.R. § 351.4(b)(3). However, pursuant to 17 U.S.C. § 801(b)(1), only the Copyright Royalty Board—not any individual participant in the proceeding—has the authority to make determinations of reasonable rates and terms for the statutory license at issue in this proceeding, and only Congress has the authority to pass new laws. Sirius XM further notes that the purpose of the current proceeding is to determine rates and terms for the digital performance of sound recordings and the making of ephemeral recordings by satellite radio and preexisting subscription services. DiMA and NMPA are not participants in this proceeding and have not submitted proposed rates or terms in this proceeding.

31. GEO proposes a BUY Button or Paid Permanent Digital Song Sale ("PPDSS") under a newly created Subpart C for § 382.

Response to 31: **Disputed.** While it appears that GEO has made the proposal described above with respect to 37 C.F.R. 382 Subparts A and B, Sirius XM notes that it has been unable to locate the text of a proposed Subpart C for § 382 in GEO's filings to date. In addition, Sirius XM disputes that GEO's proposal described above meets the policy objectives set forth in 17 U.S.C. § 801(b)(1) and GEO has not provided any competent evidence to support it.

32. "On a per-dollar basis royalties shall be divided $.21 for record labels, $.19 for the featured artist, $.01 for AFM studio players, $.01 for AFTRA background singers, $.21 for songwriters, $.21 for publishers, and $.16 for the Services or Licensees at a 84/16% split between copyright owners and the services."

Response to 32: **Disputed.** The purpose of the current proceeding is to determine rates and terms for the digital performance of sound recordings and the making of ephemeral recordings by satellite radio and preexisting subscription services. Sirius XM disputes that the proposal described above meets the policy objectives set forth in 17 U.S.C. § 801(b)(1). Moreover, GEO has not provided any competent evidence to support the proposal above.

33. All Royalties will be collected either by direct deal *or* Harry Fox, ASCAP, BMI, SESAC and Global Rights will collect §115 royalties while SoundExchange would be designated the "Collective" for all §114 royalties related a digital song sale under §382 Subpart C.

Response to 33: **Disputed.** The purpose of the current proceeding is to determine rates and terms for the digital performance of sound recordings and the making of ephemeral recordings by satellite radio and preexisting subscription services. Accordingly, the Copyright Royalty Board may not adopt the proposal above as part of this proceeding. Moreover, GEO has provided no evidence to show that the proposal described above meets the policy objectives set forth in 17 U.S.C. § 801(b)(1). Sirius XM further notes that it has been unable to locate the text of a proposed Subpart C for § 382 in GEO's filings to date.

34. The streamers' economic model leaves out one crucial element – *the customer*, and why under a newly created Subpart C is the only reasonable proposal that captures the *true value* of a music copyright today and historically. It is only reasonable from the perspective of the

copyright owners that the customer must pay for the song on a per-song basis, including the cost of copyright creation, and at a profit, like any other product.

Response to 34: **Disputed.** Sirius XM has been unable to locate the text of a proposed Subpart C for § 382 in GEO's filings to date and thus is not in a position to comment on the specifics of this proposal, but disputes that the proposal described above meets the policy objectives set forth in 17 U.S.C. § 801(b)(1) and that GEO has provided competent evidence to support it.

35. As Eagle's manager Irving Azoff recently said, "The industry can't be *pacified by lip service* about efforts to create paid subscription services."

Response to 35: **Disputed.** The proposed conclusion is merely a recitation of inadmissible hearsay. Sirius XM disputes the relevance and specific application of the quoted language above to the matters at issue in this proceeding.

36. The Judges warned that: [A revenue metric] could result in a situation in which copyright owners are forced to allow extensive use of their property without being adequately compensated due to factors unrelated to music use such as a dearth of managerial acumen at one or more Services. The similar potentiality that webcasters might generate little revenue and, under a revenue-based metric, produce a situation where copyright owners receive little compensation for the extensive use of their property was a concern that animated the Librarian to approve a per performance metric rather than providing for a revenue-based payment option in Webcaster I. *Web II*, 72 FR at 24090

Response to 36: **Disputed.** Sirius XM does not dispute that the cited language comes from the Final Rule and Order, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA, 72 Fed. Reg. 24084 (May 1, 2007) ("*Web II*"), but does dispute the relevance and specific application of the quoted language above to the matters at issue in this proceeding. GEO is quoting *Web II* without providing any context for the quote, and GEO has failed to demonstrate how the facts established in *Web II* are comparable to those in the case at bar sufficient to serve as an appropriate comparison.

37. The Judges' rejection of the percent-of-revenue structure was upheld on appeal by the D.C. Circuit Court of Appeals. Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 574 F.3d 748, 760-61 (D.C. Cir. 2009) ("Web II Appeal").

Response to 37: Disputed. Sirius XM does not dispute that these were part of the findings on appeal, but does dispute the relevance and specific application to the matters at issue in this proceeding. GEO fails to demonstrate how the facts established in *Web II* are comparable to those in the case at bar sufficient to serve as an appropriate comparison. Sirius XM addresses SoundExchange's proposal to change the rate structure from a straight percentage-of-revenue rate to a formula that calls for the greater of a percentage-of-revenue and per-subscriber rate in Section IV.A of its Proposed Findings of Fact and Conclusions of Law B and in its Reply to SoundExchange's Proposed Findings of Fact and Conclusions of Law (the "SXM Reply PFF") at Section VIII.A.

38. The Copyright Royalty Tribunal likewise stated: "We conclude that while the Tribunal must seek to minimize disruptive impacts, in trying to set a rate that provides a fair return it is not required to avoid all impacts whatsoever. The fact that an increase in the rate will increase costs is not per se an argument against raising the rate. There have been benefits to others from cost and price increases in the past without any benefit to the copyright owner." *1981 Phonorecords*, 46 FR at 10486 (emphasis added).

Response to 38: Disputed. Sirius XM does not dispute that the cited language comes from *Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates*, 46 Fed. Reg. 10466, 10486 (Feb. 3, 1981), but does dispute the relevance and specific application to the matters at issue in this proceeding. The cited precedent predates the present panel, and GEO has not provided any context or demonstrated why it is applicable, particularly given that Sirius XM is not arguing for a disruption adjustment in this proceeding. Sirius XM addresses the 801(b) factors in greater detail in SXM PFF § II.B and SXM Reply PFF at § VI (with discussion of the fourth factor in particular at § VI.D).

39. This sentiment was stated emphatically by the Judges in *Web II*: "It must be emphasized that, in reaching a determination, the Copyright Royalty Judges cannot guarantee a profitable business to every market entrant. Indeed, the normal free market processes typically weed out those entities that have poor business models or are inefficient. To allow inefficient market participants to continue to use as much music as they want and for as long a time period as they want without compensating copyright owners on the same basis as more efficient market participants trivializes the property rights of copyright owners." *Web II*, 72 FR at 24088 n.8 (emphasis added).

Response to 39: **Disputed.** Sirius XM does not dispute that the cited language comes from *Web II*, but does dispute the relevance and specific application to the matters at issue in this proceeding. GEO has not provided any context or demonstrated why it is applicable. Moreover, this decision involves a different section of the statute (§ 114) where § 801(b)(1) is not the prevailing standard as it is in this proceeding. The cited language is part of Judges' response to a specific concern about small broadcasters who had demonstrated little consideration of market impact in crafting their proposal and arguments. *Web II*, 72 Fed. Reg. at 24088. Sirius XM addresses the 801(b) factors in greater detail in its Proposed Findings of Fact and Conclusions of Law in Section II.B and in its Reply to SoundExchange's Proposed Findings of Fact and Conclusions of Law in Section VI.

40. The question of the disruptive effect was also addressed by the Judges in Phonorecords I:

"Furthermore, we find that the RIAA's contentions with respect to the disruptive impact of the current rates have little merit. RIAA's list of horribles allegedly attributable to the current mechanical rates is not supported by any substantial evidence of cause-and-effect. Even the RIAA admits that "high mechanical royalty rates did not cause all of these problems." [citation omitted] Further, the RIAA's proffered evidence fails to persuade us that reducing this one particular cost will alleviate all the claimed record industry adversity in any substantial way and fails to adequately weigh other cost-based or demand-based alternative explanations for the alleged adversity. Similarly, DiMA's claims related to lowering the bar for new market entrants are not adequately supported by evidence to indicate the degree to which the overall cost structure and pricing capabilities of such new entrants differ from existing market participants such as Apple iTunes. Thus, we find that RIAA and DiMA have failed to show that the current mechanical rates have caused and are anticipated to continue to cause an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for the parties impacted by the rate to adequately adapt to the changed circumstances produced by the rate change and, as a consequence, such adverse impacts threaten the viability of the music currently offered to consumers under this license."

Response to 40: **Disputed in part.** Sirius XM does not dispute that the cited language comes from *Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding*, 74 Fed. Reg. 4510, 4525 (Jan. 26, 2009) ("*Phonorecords I*"), but does dispute the relevance and specific application to the matters at issue in this proceeding. GEO has not provided any context or demonstrated why it is applicable, particularly given that Sirius XM is not arguing for a disruption adjustment in this proceeding. Sirius XM addresses the 801(b) factors in greater detail in SXM PFF § II.B and in SXM Reply PFF § VI (with discussion of the fourth factor in particular at § VI.D).

41. One rate structure proposed by GEO in the BUY button is a simple and transparent structure that directly links payment with use and access to the songs. GEO's proposed rates are supportable and fully supported, SoundExchange members and Americanartists and independent labels with a fair return.

Response to 41: **Disputed.** The purpose of the current proceeding is to determine rates and terms for the digital performance of sound recordings and the making of ephemeral recordings by satellite radio and preexisting subscription services. Sirius XM disputes that the proposal described above meets the policy objectives set forth in 17 U.S.C. § 801(b)(1).

42. The Services came into this Proceeding proclaiming that they wanted to preserve the status quo by rolling the rates and terms set by settlements previous SDARS forward. Moreover, the Services failed to provide any evidence supporting their starting place: the existing rates and terms. Instead, they simply presumed that the existing rates and terms needed no evidence to support their continuation into the future, a form of stasis. In short, the Services chose to ignore the fundamental requirement of the very rates and terms that they seek to roll forward: the requirement that the rates and terms be established de novo. As is unambiguously required under the current regulations (under the heading "Effect of rates"), in this proceeding, "the royalty rates payable for a compulsory license shall be established de novo." 37 C.F.R. § 385.17. This "*de novo*" provision "has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy." *United States v. Raddatz*, 447 U.S. 667, 690 (1980) (emphasis added). Indeed, "no form of . . . deference is acceptable." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

Response to 42: **Disputed.** This statement is an opinion, is improperly argumentative, and is not supported by the facts or the record in this case. It also mischaracterizes Sirius XM's

proposed rates and terms, cites to an inapplicable provision of the Code of Federal Regulations, and is factually incorrect. There is no SDARS "settlement" that Sirius XM is proposing to "roll" forward, and Part 385 of Title 37 of the Code of Federal Regulations concerns rates and terms for the use of musical works under compulsory license for making and distributing of physical and digital phonorecords. As such, it is inapplicable here.

To the extent that GEO is suggesting that the Judges may not consider existing statutory rates and that the Judges' statutory duty to determine rates anew for each license period effectively prohibits any reliance on their prior work in *SDARS II*, Sirius XM addresses that argument in its Reply to SoundExchange's Proposed Findings of Fact and Conclusions of Law at Section V.A.

43. In the end, the Services entirely failed to marshal evidence to justify rolling forward the existing rates and terms, let alone to support the changes to the rates and terms that their proposals seek. These post-hearing submissions demonstrate that the same is not true of the SoundExchange's and GEO's proposed rates and terms, which are supported by the clear weight of precedent, the sound reasoning of experts, and most importantly, the evidence in the record.

Response to 43: **Disputed.** This statement is an opinion, is improperly argumentative, and is not supported by the facts or the record in this case. It also mischaracterizes Sirius XM's proposed rates and terms, cites to an inapplicable provision of the Code of Federal Regulations, and is factually incorrect. Sirius XM's three-pronged analysis supporting its rate proposal is discussed at its Proposed Findings of Fact and Conclusions of Law in Section III, its critique of SoundExchange's proposed rate level and structure is discussed in Section IV, and its proposed terms are addressed in Section V. The rate proposal of George Johnson, who purports to rely on SoundExchange's economic presentation, *see* 5/2/17 Tr. 2197:7-9 (Johnson) ("I'm relying on the evidence that SoundExchange and their economists presented to this proceeding."), and proposes monthly per subscriber rates approximately twice as high as SoundExchange, should be rejected for reasons similar to those described below with respect to SoundExchange's rate proposal. The

specific issues raised by SoundExchange in its Proposed Findings of Fact and Conclusions of Law are addressed in Sirius XM's Reply to SoundExchange's Proposed Findings of Fact and Conclusions of Law.

44. As discussed above, prevailing statutory rates are not market benchmarks, nor are deals under a statutory regime that are at or near the statutory terms. The CRB could not have been much clearer in *SDARS II*, in a Section entitled "The Prevailing Statutory Rate," holding that *the statutory rate "is a rate that was negotiated in the shadow of the statutory licensing system and cannot properly be said to be a market benchmark rate…*" 78 FR at 23058 (citation omitted).

Response to 44: Disputed. To the extent that GEO argues that the benchmarks in this proceeding must be "marketplace benchmarks," Sirius XM disputes that contention because in a proceeding governed by the Section 801(b) rate-setting standard, as here, the Judges are "under no obligation to choose a rate derived from a market-based approach." *SoundExchange, Inc. v. Librarian of Cong.*, 571 F. 3d 1220, 1224 (D.C. Cir. 2009). Sirius XM addresses the standard that applies in this proceeding in Section II of its Proposed Findings of Fact and Conclusions of Law. Sirius XM points out the fallacies in SoundExchange's related arguments in Sections III and V.A of its Reply to SoundExchange's Proposed Findings of Fact and Conclusions of Law.

45. Nor is this surprising. *Of course* statutory rates are not market benchmarks. Ignoring the overwhelming shadow of statutory rates denies their very purpose. Statutory rates are compulsory rates —which are fixed and which exist at a point in time based on the facts existing at that point in time. A statutory rate *could* mirror a marketplace rate —but that would be despite it being a statutory rate, not because of it. One would have to *prove* through extrinsic evidence why a particular statutory rate reflected a marketplace, *because* no economic principles provide that statutory rates bake in understanding of the marketplace.

Response to 45: Disputed. Sirius XM refers to its Response to ¶ 44 above.

46. One could theorize the existence of evidence that would prove that not only was a statutory rate a marketplace benchmark but that there had been no changes in facts and circumstances that warranted changes in such rates and terms (or evidence could be presented that enabled Judges to adjust such rates and terms based on the changes in facts and circumstances). But such evidence would have to be presented, not assumed, both as to the underlying evidentiary basis for either the prior rates and terms or for a settlement creating those terms and any changes that have occurred.

Response to 46: **Disputed.** Sirius XM refers to its Response to ¶ 44 above. Sirius XM also disputes the suggestion that it has not introduced evidence of the circumstances surrounding the adoption of the prior rates and whether changes in the market have occurred since then. *See, e.g.*, SXM PFF § III.A ("Developments Since *SDARS II* Demonstrate That the Prevailing 11% Royalty Rate Is, if Anything, Too High); *see also* SXM Reply PFF § V ("Professor Shapiro's Assessment of Changes Since *SDARS II* Is A Useful And Informative Piece of Sirius XM's Three-pronged Analysis That Stands Unrebutted By SoundExchange").

47. The purpose of economic benchmarking is to use marketplace rates that by their very *nature as free market deals* bake in elements that we expect from the market. Longstanding economic principles concerning free market transactions support this use of marketplace deals precisely because of the dynamics of sophisticated entities in the marketplace. Statutory rates and the direct deals under them do not do this. There is no free-market in music.

Response to 47: **Disputed.** Sirius XM refers to its Response to ¶¶ 44-46 above.

48. The Judges recognized in *Web IV* that direct deals reflecting statutory terms are of course not benchmarks either, noting that deal terms that mirror statutory rates "reveal[] nothing about whether the parties in the marketplace would agree to include such a prong in an agreement." (*Web IV*, 81 FR at 26325-26)

Response to 48: **Disputed.** *See* SXM PFF § II.A & B.

49. The Judges in *Phonorecords* I explicitly remarked on the "considerable impact" of the shadow of the statutory rates on all private agreements thereunder:

The complexity of compliance, and the associated transactions costs, create a curious anomaly: virtually no one uses section 115 to license reproductions of musical works, yet the parties in this proceeding are willing to expend considerable time and expense to litigate its royalty rates and terms. The Judges are, therefore, seemingly tasked with setting rates and terms for a useless license. The testimony in this proceeding makes clear, however, that despite its disuse, the section 115 license exerts a ghost-in-the-attic like effect on all those who live below it. [citation omitted] Thus, the rates and terms that we set today will have considerable impact on the private agreements that enable copyright users to clear the rights for reproduction and distribution of musical works. Phonorecords 1, 74 FR at 4513.

Response to 49: **Disputed.** Sirius XM does not dispute that the cited language comes from *Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding*, 74 Fed. Reg. 4510, 4525 (Jan. 26, 2009) ("*Phonorecords I*"), but does dispute the relevance and specific

application to the matters at issue in this proceeding.

50. This "de novo" provision "has an accepted meaning in the law. It means an independent determination of a controversy that accords *no deference* to any prior resolution of the same controversy." *United States v. Raddatz*, 447 U.S. 667, 690 (1980) (emphasis added). Indeed, "no form of . . . deference is acceptable." *Salve Regina Coll v. Russell*, 499 U.S. 225, 238 (1991). "*De novo* review . . . is independent and plenary; as the Latin term suggests, we look at the matter anew, as though the matter had come to the courts for the first time." *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168 (2d Cir. 2001) (citation omitted); *see also Doe v. United States*, 821 F.2d 694, 698 (D.C. Cir. 1987) (Ginsburg, J.) ("De novo means here, as it ordinarily does, a fresh, independent determination of 'the matter' at stake; the court's inquiry is not limited to or constricted by the administrative record, nor is any deference due the agency's conclusion. . . . Essentially then, the district court's charge was to put itself in the agency's place, to make anew the same judgment earlier made by the agency.").

Response to 50: **Disputed.** The "de novo" provision that GEO appears to be discussing above is at 37 C.F.R. § 385.17, and Part 385 of Title 37 of the Code of Federal Regulations concerns rates and terms for the use of musical works under compulsory license for making and distributing of physical and digital phonorecords. As such, it is inapplicable to the matters at issue in this proceeding. To the extent that GEO is suggesting that the Judges may not consider existing statutory rates and that the Judges' statutory duty to determine rates anew for each license period effectively prohibits any reliance on their prior work in *SDARS II*, Sirius XM addresses that argument in its Reply to SoundExchange's Proposed Findings of Fact and Conclusions of Law at Section V.A.

RESPONSES TO GEORGE JOHNSON'S PROPOSED FINDINGS OF FACT

1. Copyright is in the Creator's interest first and foremost, not the public or the licensees.

Response to 1: Disputed. This is an inaccurate statement of U.S. copyright law or policy and is offered without evidentiary support.

2. No licensee has the right to license anything without the Creator's expressed written permission.

Response to 2: Disputed. This is an inaccurate statement of U.S. copyright law or policy and is offered without evidentiary support.

3. There is no such thing as a "hypothetical marketplace".

Response to 3: Disputed. There is no evidentiary support for this proposed finding.

4. There is no such thing as a "voluntary negotiation" inside a federal rate proceeding.

Response to 4: Disputed. Parties frequently voluntarily negotiate agreements in the shadow or during a rate-setting proceeding. There is no evidentiary support for this proposed finding.

5. There is no such thing as a "fair" or "free" market inside a federal rate proceeding.

Response to 5: Disputed. Sirius XM disputes the relevance and specific application of the proposition above to the matters at issue in this proceeding. There is no evidentiary support for this proposed finding.

6. There is no such thing as an "effectively competitive" market inside a federal rate proceeding.

Response to 6: Disputed. There is no evidentiary support for this proposed finding.

7. $.00 per song is confiscatory and unreasonable according to several Supreme Court decisions.

Response to 7: Disputed. There is no evidentiary or legal support for this proposed finding.

8. There is no such thing as a free market when forced by by the federal government to accept a compulsory license for your songs, and especially when the rate is set at $.00.

Response to 8: **Disputed.** There is no evidentiary or legal support for this proposed finding.

9. Counsel in this rate proceeding could never survive on $.00 per billable hour or on a $7.99 subscription model to provide unlimited legal services at $.00 per billable hour.

Response to 9: **Disputed.** There is no evidentiary or legal support for this proposed finding.

10. Benchmarks delay deals in music licensing and at below market rates.

Response to 10: **Disputed.** There is no factual or legal support for this proposed finding.

11. Foreign and domestic streaming corporations, foreign owned major record labels, past Congressional legislation, U.S. Justice Department consent decrees, DMCA "safe harbors", federal rate courts, statutory licenses, statutory rates, compulsory licenses, central economic planning, nationalized price-fixing of government royalties, music lobbyists, anti-copyright attorneys, and other outdated federal regulations have destroyed a significant segment of the songwriting, music publishing and sound recording industries — and the United States economy.

Response to 11: **Disputed.** There is no factual or legal support for this proposed finding.

12. According to N.S.A.I, the Nashville Songwriters Association International, there has been an 80% to 90% decline in Nashville songwriters and music publishers since the year 2000. GEO has also personally witnessed this decline on Music Row as an expert witness in songwriting in Nashville for 20 years.

Response to 12: **Disputed.** This statement is based on inadmissible hearsay, and is outside the area in which GEO was qualified as an expert in this matter. There is no factual or legal support for this proposed finding.

13. Supporting the copyright interests of all American singers, songwriters, music publishers, recording artists, independent record labels, producers, engineers, background singers, and studio musicians, as well as the creativity they inspire, is vital to the economic and cultural future of the United States.

Response to 13: **Disputed.** There is no factual or legal support for this proposed finding.

14. Investment in the creation of great musical compositions and great recorded music should be nurtured and encouraged. It is the duty of the U.S. Congress, the U.S. Justice Department and The Copyright Office to protect the personal private property of all American citizens and not to centrally plan the music royalty or music copyright economies by price-fixing individual property owner's rates at literally $.00 and $.00 cents per copyright, PA and SR.

Response to 14: **Disputed.** There is no factual or legal support for this proposed finding.

15. After over 100 years of failed central economic planning and price-fixing of American songwriter's and publisher's music copyrights and personal private property, it is vital to individual American music copyright creators that the appropriate free-market economic incentives are present for musical creators and their investors to take the risks necessary to continue to create and innovate — this fact now applies to §114 digital sound recordings and streaming.

Response to 15: **Disputed.** There is no factual or legal support for this proposed finding.

16. The United States should be a leader in promoting the creative industries including performing, songwriting, music publishing, and sound recording copyright production.

Response to 16: **Disputed.** There is no factual or legal support for this proposed finding, which is in any event a personal opinion.

17. The genius of American songwriters, music publishers, performers, recording artists, and independent record labels has created a great cultural legacy and continues to create a critical source of income to the American economy.

Response to 17: **Disputed in part.** Sirius XM does not dispute that America has a great cultural legacy with respect to music, but there is otherwise no factual or legal support for this proposed finding.

18. The Natural Rights and Common Law background of the U.S. Constitution, the "Copyright Clause" in Article I, Section 8, Clause 8 of the U.S. Constitution, (and the Copyright Act of 1790 - repealed) specifically empower the The Copyright Office and Copyright Royalty Board Judges to encourage and protect individual artistic creations through federal copyright law.

Response to 18: **Disputed.** There is no factual or legal support for this proposed finding.

19. It is well-established that President George Washington and James Madison based the federal copyright protections of The Copyright Act of 1790 on the English Statute of Anne. However, Article IV of the Statute of Anne, which called for an administrative board to set "reasonable" rates for copyrights similar to the current Copyright Royalty Board, was intentionally rejected by Washington and Madison to specifically create a prosperous free-market in American copyright creation. The Copyright Act of 1790 purposely contained no statutory license, no statutory rate and no compulsory license.

Response to 19: **Disputed.** There is no factual or legal support for this proposed finding.

20. It is well-established by law and legal precedent that copyright is a private property right guaranteed by the 5th Amendment of the U.S. Constitution. It is also well established that property can only be taken for public use and that no person shall be deprived of life, liberty, or property without due process or just compensation by a jury of their peers.

Response to 20: **Disputed.** There is no factual or legal support for this proposed finding.

21. It is well-established by law and legal precedent that contract rights are a form of private property rights that are guaranteed by the 5th Amendment of the U.S. Constitution and that no person shall be deprived of life, liberty, or property without due process or just compensation by a jury of their peers.

Response to 21: **Disputed.** There is no factual or legal support for this proposed finding.

22. It is well established by law and legal precedent that copyright is a form of protected free speech and Congress shall make no law abridging freedom of speech guaranteed under the 1st Amendment of the U.S. Constitution.

Response to 22: **Disputed.** Sirius XM does not dispute that the First Amendment limits the ability of Congress to restrict speech, but there is otherwise no factual or legal support for this proposed finding.

23. It is well established by law and legal precedent that copyright contains a right to privacy which shall not be violated and is guaranteed to all U.S. citizens under the 4th Amendment of the U.S. Constitution.

Response to 23: **Disputed.** There is no factual or legal support for this proposed finding.

24. The three "major American record labels", Warner Music, Universal Music, and Sony/ Columbia Music, are now all 100% foreign owned in Russia, France and Japan.

Response to 24: **Not disputed.**

25. Using 2014 statistics, Pandora Media, Inc. executives and investors have extracted almost a-half-a-billion dollars in personal executive stock compensation for 4 years while "*losing money*" and lobbying Congress to lower statutory §115 royalty rates of American songwriters and music publishers from $.00 per-stream, that is split, to less than zero.

Response to 25: **Disputed.** There is no factual support for this proposed finding.

26. The Copyright Office has determined as policy in it's most recent copyright reform study that "*There is no policy justification for a standard that requires music creators to subsidize those who seek to profit from their works*".

Response to 26: **Disputed.** There is no factual or legal support for this proposed finding.

27. Congressionally encouraged, private negotiations to compensate singers, songwriters, music publishers, recording artists, and independent record labels on streaming, webcasting, or internet radio services have failed to date.

Response to 27: **Disputed.** There is no factual support for this proposed finding.

28. Copyright law was purposely designed by Washington and Madison to serve both public and private interests and which can only be achieved when the individual rights and private property interests of copyright creators are recognized by the Copyright Office as paramount and which override any demands by the public interest or music licensees.

Response to 28: **Disputed.** There is no factual or legal support for this proposed finding.

29. In the U.S. Supreme Court case, *Eldred v. Ashcroft*, the majority's firm response to Justice Breyer's dissent finds that "*Copyright law serves public ends by providing individuals with an incentive to pursue private ones*".

Response to 29: **Disputed.** Sirius XM does not dispute the accuracy of the quotation, but does dispute the relevance and specific application to the matters at issue in this proceeding.

30. As James Madison is quoted, in referencing Adam Smith discussing the Copyright Clause of the U.S. Constitution, he affirms, "*The public good fully coincides…with the claims of individuals.*"

Response to 30: **Disputed.** There is no factual support for this proposed finding.

31. The Copyright Royalty Board should provide meaningful copyright and royalty protection for musical artists and copyright creators.

Response to 31: **Disputed.** As relevant to this proceeding, the Copyright Royalty Board is tasked with setting rates and terms that satisfy the policy objectives of Section 801(b).

32. The royalty rate standard for the public performance of sound recordings or musical compositions should be what a true free-market would bear, not a "hypothetical marketplace", between real willing buyers and real willing sellers and without any government intervention or interference.

Response to 32: **Disputed.** The Copyright Royalty Board is tasked with setting rates and terms in this proceeding that satisfy the policy objectives of Section 801(b). It is well-established that Section 801(b) is not intended to, and does not, require the Judges to set "market" rates. *See RIAA v. Librarian of Cong.*, 176 F.3d 528, 533 (D.C. Cir. 1999) ("The statute does not use the term 'market rates,' nor does it require that the term 'reasonable rates' be defined as market rates. Moreover, there is no reason to think that the two terms are coterminous, for it is obvious that a 'market rate' may not be reasonable,' and vice versa.").

Dated: June 29, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served by e-mail on this 29th day of June, 2017 on the following persons:

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Reed Collins/dlf

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Certificate of Service

I hereby certify that on Thursday, June 29, 2017 I provided a true and correct copy of the Sirius XM Radio Inc.'s Reply to George Johnson's Proposed Findings of Fact and Conclusions of Law to the following:

Sony Music Entertainment, represented by David A. Handzo served via Electronic Service at dhandzo@jenner.com

SAG-AFTRA, represented by David A. Handzo served via Electronic Service at dhandzo@jenner.com

Music Choice, represented by Paul M Fakler served via Electronic Service at paul.fakler@arentfox.com

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Signed: /s/ Todd Larson